STATE OF MICHIGAN

COURT OF APPEALS

LUZ VICTORIA GONZALEZ,

Plaintiff-Appellant,

v

ST. MARY'S MEDICAL CENTER OF SAGINAW,

Defendant-Appellee.

UNPUBLISHED
July 12, 2005

No. 261325
Saginaw Circuit Court
LC No. 02-045562-CZ

Before: Fitzgerald, P.J., and Meter and Owens, JJ.

PER CURIAM.

Plaintiff appeals as of right the opinion and order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10) of plaintiff's claims for age and disability discrimination and wrongful discharge/breach of contract. We affirm.

Plaintiff first argues that the trial court erred in granting summary disposition of her claim for discrimination under the Michigan Persons With Disabilities Civil Rights Act (PWDCRA), MCL 37.1101 *et seq*. We review a trial court's decision on a summary disposition motion de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). When reviewing a motion brought under MCR 2.116(C)(10), the court must examine the documentary evidence presented below and, drawing all reasonable inferences in favor of the nonmoving party, determine whether a genuine issue of material fact exists. *Quinto v Cross & Peters Co*, 451 Mich 358, 361-362; 547 NW2d 314 (1996).

The PWDCRA prohibits an employer from discharging, refusing to hire, or otherwise discriminating against an individual with respect to the terms and conditions of employment because of a disability that is unrelated to the individual's ability to perform the job. MCL 37.1202(1)(a) and (b). Discrimination can be established by either direct or circumstantial evidence. *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 132; 666 NW2d

186 (2003). In the present case, plaintiff does not claim to have direct evidence of disability discrimination.[1]

"In cases involving indirect or circumstantial evidence, a plaintiff must proceed by using the burden-shifting approach set forth in *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973)." *Sniecinski*, *supra* at 133-134; see also *Hazle v Ford Motor Co*, 464 Mich 456, 462; 628 NW2d 515 (2001). "This approach allows 'a plaintiff to present a rebuttable prima facie case on the basis of proofs from which a factfinder could *infer* that the plaintiff was the victim of unlawful discrimination." *Sniecinski*, *supra* at 134, quoting *DeBrow v Century 21 Great Lakes, Inc (After Remand)*, 463 Mich 534, 538; 620 NW2d 836 (2001). This test applies to claims of disability discrimination as well as age discrimination. *Hall v McRea Corp*, 238 Mich App 361, 371; 605 NW2d 354 (1999), remanded for reconsideration in light of *Hazle*, 465 Mich 919 (2001).

"To establish a rebuttable prima facie case of discrimination [under *McDonnell Douglas*], a plaintiff must present evidence that (1) she belongs to a protected class, (2) she suffered an adverse employment action, (3) she was qualified for the position, and (4) her failure to obtain the position occurred under circumstances giving rise to an inference of unlawful discrimination." *Sniecinski*, *supra* at 134. The elements of the test must be tailored to the facts and circumstances of the particular case. *Id.* n 7; *Hazle*, *supra* at 463 n 6. "[A] plaintiff must [also] establish a causal link between the discriminatory animus and the adverse employment decision." *Sniecinski*, *supra* at 134-135. However, "[b]ecause a prima facie case under the *McDonnell Douglas* test creates a presumption of unlawful discrimination, causation is presumed." *Id*. at 135.

A plaintiff cannot satisfy the third and fourth prongs of the *McDonnell Douglas* test "merely by showing that [s]he was qualified for the position and that a nonminority candidate was chosen instead." *Hazle*, *supra* at 470; see also *Matras v Amoco Oil Co*, 424 Mich 675, 684; 385 NW2d 586 (1986). This is because, "[a]s a matter of law, an inference of discrimination does not arise merely because an employer has chosen between two qualified candidates." *Hazle*, *supra* at 471.

In *Hazle*, *supra* at 471 n 14, the Supreme Court acknowledged its decision in *Lytle v Malady (On Rehearing)*, 458 Mich 153, 177; 579 NW2d 906 (1998), wherein it stated that the plaintiff had satisfied the *McDonnell Douglas* test "by presenting evidence that 'she was replaced by a younger person.'" However, the *Hazle* Court specifically "caution[ed] the bench and bar not to rely on *Lytle* for the proposition that a prima facie case of unlawful discrimination

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[1] At best, plaintiff notes that Floyd Johnson, defendant's former vice-president in charge of human resources, testified in another case that defendant had a policy of not allowing employees to return to work with medical restrictions. However, Johnson was not employed by defendant at times relevant to this case, and, even if he had, plaintiff was cleared to return to work without restrictions. Accordingly, Johnson's alleged statement is not direct evidence of disability discrimination against plaintiff.

can be established merely by providing evidence that a qualified minority candidate was rejected in favor of a qualified nonminority candidate." *Id.*

"Once a plaintiff has presented a prima facie case of discrimination, the burden . . . shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the adverse employment action." *Sniecinski*, *supra* at 134. "A defendant may rebut the presumption of causation by articulating a legitimate, nondiscriminatory reason for the employment decision." *Id.* The burden then shifts back to the plaintiff to show that the defendant's reasons were not the true reasons, but a mere pretext for discrimination. *Id.* However, "disproof of an employer's articulated reason for an adverse employment decision defeats summary disposition only if such disproof also raises a triable issue that discriminatory animus was a motivating factor underlying the employer's action." *Lytle*, *supra* at 175. In attempting to disprove the employer's articulated reason, "[t]he plaintiff cannot simply show that the employer's decision was wrong or mistaken, since the factual dispute at issue is whether discriminatory animus motivated the employer, not whether the employer is wise, shrewd, prudent, or competent." *Hazle*, *supra* at 476, quoting *Town v Michigan Bell Tel Co*, 455 Mich 688, 704; 568 NW2d 64 (1997). Courts are not to second-guess an employer's "business judgment." *Hazle*, *supra* at 475-476. In other words, a "plaintiff must not merely raise a triable issue that the employer's proffered reason was pretextual, but that it was a pretext for . . . discrimination." *Lytle*, *supra* at 175-176.

In the present case, the trial court found that plaintiff sufficiently established (1) that she was disabled, (2) that she suffered adverse employment decisions, i.e., not being reinstated after her leave, and being terminated, (3) that she was qualified for a position as a unit secretary, and (4) that the adverse employment decisions occurred under circumstances giving rise to an inference of unlawful discrimination. However, defendant showed that plaintiff failed to complete a transfer request form, which was the procedure set out in the employment manual for obtaining an interview for an open position upon reinstatement. Because plaintiff did not obtain a position by the time her leave expired, she was terminated. The trial court concluded that plaintiff failed to rebut this evidence, or otherwise show that defendant's proffered explanation was a mere pretext for disability discrimination.

We agree with the trial court that plaintiff sufficiently showed that she was disabled for purposes of MCL 37.1103(d), given her affidavit indicating that her back problems substantially limited one or more life activities, including bending, lifting, walking, standing, cooking, and tending to her home, but did not affect her ability to do her job.[2] Plaintiff also showed that she suffered adverse employment actions, in particular, not being reinstated to a position after her doctor released her to return to work, being terminated from defendant's employment after her leave of absence expired, and not being rehired after being instructed to complete a new

[2] We disagree with defendant's claim that plaintiff's affidavit improperly contradicts her deposition testimony. See *Dykes v William Beaumont Hosp*, 246 Mich App 471, 480-481; 633 NW2d 440 (2001). The record discloses that plaintiff testified to substantially the same limitations in her deposition as she described in her affidavit, which limitations, she stated, continued after her surgery.

employment application. It is not disputed that plaintiff was qualified for a unit secretary position after her doctor released her to return to work. Lastly, plaintiff showed that the first two employment decisions occurred under circumstances giving rise to an inference of discrimination. In particular, plaintiff was attempting to return from leave after having back surgery and, while defendant's employment manager, Diane LaMountain, and others were aware that the manual required that she file a transfer request form, evidence indicated that plaintiff was not made aware of the proper procedure. Additionally, plaintiff showed that others, presumably nondisabled individuals, were hired for unit secretary positions for which she was qualified. Thus, the trial court correctly found that plaintiff sufficiently established a prima facie case of disability discrimination arising from defendant's failure to reinstate plaintiff, and her termination from employment.

The burden of proof having shifted, defendant showed that its employment manual required that plaintiff file a transfer request form in order to be considered for any position that came open while she was still an employee, but failed to do so, even though she had filed such forms in years past. Additionally, because plaintiff did not obtain a position by the time her leave expired, she was terminated as provided by the manual. Thus, as the trial court found, defendant rebutted plaintiff's prima facie case by articulating legitimate nondiscriminatory reasons for its first two adverse employment decisions.

In attempting to disprove defendant's facially neutral explanations, plaintiff undermined the credibility of Janet Parker, the vice-president in charge of human resources, and showed that Parker and others may have had ulterior reasons for interfering with plaintiff's efforts to return from her leave of absence. In particular, plaintiff produced evidence that Parker weighed in whenever nurse managers considered offering plaintiff a position, and the employment offers were then withdrawn from consideration. Additionally, Parker sent an email to Joseph Fitzgibbon essentially warning him not to rehire plaintiff, and, when she was questioned about it, Parker attempted to reference alleged performance problems that defendant had already denied existed. Plaintiff also raised questions concerning whether LaMountain told her to contact head nurses directly instead of simply pointing out that the employment manual required that plaintiff file a transfer request from. However, while plaintiff showed that defendant treated her poorly, creating a question of fact concerning pretext is not enough. As our Supreme Court explained in *Lytle*, *supra* at 175-176, a "plaintiff must not merely raise a triable issue that the employer's proffered reason was pretextual, but that it was a pretext for . . . discrimination." See also *Hazle*, *supra* at 476. We agree with the trial court that plaintiff never showed that defendant's proffered explanations were a pretext *for disability discrimination*. Thus, plaintiff failed to rebut defendant's nondiscriminatory explanation for its actions.

Concerning defendant's failure to rehire plaintiff after her termination, plaintiff raised a question of fact whether she filed an application for new employment. She also showed that—for unexplained reasons—Parker took an active role in making sure that she was not rehired. However, plaintiff showed nothing more than that defendant chose to hire other applicants instead of her. As previously indicated, "an inference of discrimination does not arise merely because an employer has chosen between two qualified candidates." *Hazle*, *supra* at 471 and n 14. Thus, plaintiff failed to show that this adverse employment decision occurred under circumstances giving rise to an inference of discrimination.

For these reasons, the trial court properly granted summary disposition with respect to plaintiff's claim for disability discrimination.

Next, plaintiff argues that the trial court erred in granting summary disposition of her age discrimination claim. We disagree.

Plaintiff asserts that she was fifty-four years old, that she suffered adverse employment actions (not being reinstated, being terminated, and not being rehired), that she was qualified for the various positions she sought, and that younger people were hired instead of her. However, while plaintiff showed that a younger person was hired for her position when she went on leave, she did not specifically show that younger persons were hired for each of the positions she sought upon returning from leave, which is the basis for this action. Furthermore, even if plaintiff could demonstrate this, as a matter of law she cannot satisfy the third and fourth prongs of the *McDonnell Douglas* test "merely by showing that [s]he was qualified for the position and that a nonminority candidate was chosen instead." *Id*. at 470; see also *Matras*, *supra* at 684. Because plaintiff did not show anything else, the trial court properly concluded that she failed to establish a prima facie case of age discrimination.

Lastly, plaintiff argues that the trial court erred in granting summary disposition to defendant of her wrongful discharge/breach of contract claim. We disagree.

It is a "fundamental proposition that the parties to an employment contract are free to bind themselves to whatever termination provisions they wish." *Thomas v John Deere Corp*, 205 Mich App 91, 93-94; 517 NW2d 265 (1994). This includes termination provisions falling somewhere in between the extremes of "just-cause" and "at-will" employment. *Id*. at 94. "While an employer need not establish personnel policies or practices, where an employer chooses to establish such policies and practices and makes them known to its employees, the employment relationship is presumably enhanced." *Toussaint v Blue Cross & Blue Shield of Michigan*, 408 Mich 579, 613; 292 NW2d 880 (1980). While plaintiff in this case readily admits that she was an at-will employee, defendant's statements of company policy and procedure may give rise to enforceable contract rights. *Sepanske v Bendix Corp*, 147 Mich App 819, 826; 384 NW2d 54 (1985). In particular, "[w]hile defendant was not duty bound to establish a policy for employees returning from . . . leave, having done so, the policy became a contractual obligation," and "[d]efendant's employees could expect that the policies would be followed." *Id*.

In *Sepanske*, an employee quit his job and sued his former employer for breach of contract when, following his return from a company-sponsored social service leave of absence, the employer violated the company's policy manual by reassigning him to a job that was not the same as, or equivalent to, his former position. *Id*. at 822-824. This Court held that because the plaintiff was an employee at will, he had no reasonable expectation of continued employment. *Id*. at 829. Therefore, the plaintiff could only recover nominal damages for his employer's breach of contract. *Id*.

In *Health Call v Atrium Home & Health Care Services, Inc*, 265 Mich App 79, 81-83; 695 NW2d 337 (2005), this Court reversed the dismissal of claims for breach of contract and tortious interference with an at-will independent contractor agreement. The Court held that the plaintiff could proceed with its claims even though, under *Environair, Inc v Steelcase, Inc*, 190

Mich App 289, 290-291, 294; 475 NW2d 366 (1991), recovery under an at-will contract is limited to nominal damages. *Id*. at 82-83.[3] While the limitation on damages applies to the present case, there is no need to reach the question whether dismissal is appropriate merely because only nominal damages can be recovered.

Rather, because plaintiff failed to complete a transfer request form for any position, she failed to trigger defendant's responsibility to consider her, as an employee attempting to return from a leave of absence, for open positions for which she was qualified. She was terminated because her leave of absence expired before she obtained a new position.[4] Thus, there is no question of material fact concerning whether plaintiff was properly terminated from her employment when her leave of absence expired. With regard to plaintiff's application for new employment, we fail to understand how defendant can owe any contractual obligations to a non-employee, even if its policy manual states that it will search its application files when positions become open. Thus, plaintiff failed to show that a question of material fact exists with regard to her breach of contract/wrongful discharge claim.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Patrick M. Meter
/s/ Donald S. Owens

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[3] The Court disagreed with the holding in *Environair* that, when an at-will contract is involved, recovery is always limited to nominal damages only, regardless of the nature of the agreement. *Health Call*, *supra* at 83-86. On February 28, 2005, this Court issued an order vacating part III of the opinion in *Health Call*, and convening a special panel to resolve the disagreement between the two cases.

[4] It is immaterial whether plaintiff's leave expired in November 1999, or January 2000, because she never did secure a position.